

ST 95-33
Tax Type: SALES TAX
Issue: Statute of Limitations Application

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

XXXXXX,)
)
Taxpayer)
)
v.) No.
) IBT
) Claim For Refund
THE DEPARTMENT OF REVENUE)
OF THE STATE OF ILLINOIS)
)

RECOMMENDATION FOR DISPOSITION

APPEARANCES: Attorney, for the taxpayer; Ms. Mary Kennedy, Special Assistant Attorney General, for the Department of Revenue.

SYNOPSIS: This matter comes on to be heard upon the denial of the taxpayer's claim for refund on the basis that it is barred by the statute of limitations. Upon consideration of the evidence of record and the arguments of the parties through their respective counsel, it is recommended that this matter be resolved in favor of the Department.

FINDINGS OF FACT:

1. The Department's prima facie case was established by the introduction into evidence, under certification of the Director of Revenue, of Department exhibits 1 and 2, which consisted of the Claim for Verified Overpayment and the Notice of Department's Tentative Determination of Claim;

2. The Claim for Verified Overpayment bears no signature affixed by the claimant as required by Part 4 thereof, but refers to an attached signed letter; (Department Ex. No. 1)

3. No signed letter was either referred to, introduced or admitted

into evidence;

4. The Claim for Verified Overpayment bears no date affixed by the claimant, but shows a date stamp as having been received by the Department of Revenue at least by November 4, 1994. (Department Ex. No. 1)

5. The Claim for Verified Overpayment contains no statement in explanation of why the claim is being filed, as required by Part 2 of such claim. (Department Ex. No. 1)

6. The amount of overpayment as stated on the Claim is \$703.36. (Department Ex. No. 1)

7. Apart from the Claim for Verified Overpayment, the taxpayer submitted a letter dated October 25, 1994 advising the Department that she was no longer in business and requesting a refund of the account balance in the amount of \$703.36. (Taxpayer Ex. No. 2)

8. The Account Detail For Sales Tax shows that taxpayer's account has been in overpayment since August 9, 1988 by the amount of \$772.15. A total of \$68.79 was applied against that overpayment to taxpayer's ROT return on March 23, 1994. (Taxpayer Ex. No. 1)

CONCLUSIONS OF LAW: 35 ILCS 120/6, which governs applications for credit or refund of overpaid Retailers' Occupation Taxes, provides as follows:

If it appears, after claim therefor filed with the Department, that an amount of tax or penalty or interest has been paid which was not due under this Act, whether as the result of a mistake of fact or an error of law, except as hereinafter provided, then the Department shall issue a credit memorandum or refund to the person who made the erroneous payment...

However, as to any claim for credit or refund filed with the Department on and after each January 1 and July 1 no amount of tax or penalty or interest erroneously paid... more than 3 years prior to such January 1 and July 1, respectively, shall be credited or refunded... (emphasis supplied)

Pursuant to the language of the Act as stated, it appears certain that the claim for refund filed by the taxpayer comes more than 3 years after the erroneous payments, which constitute the basis of the claim, were paid.

Due to the fact that taxpayer's account balance as of August 9, 1988 was more than \$700.00 in overage, a claim which is filed at the earliest on October 25, 1994 exceeds the 3 year limitation by a wide margin.

Although counsel for the taxpayer argues that the period for the statute does not begin to run until May of 1994, the point at which a portion of the stated overage was credited to taxpayer's final return, I find no support in the law for such position.

As pointed out by counsel for the Department (Tr. p. 5), the statute looks to two points of reference, the date of payment of the tax and the date the claim is filed to recover those taxes. Insofar as it is uncontested that the overpayments equal or predate August of 1988, a claim which is filed in 1994 is clearly too late in which to be honored. The change in the account status occasioned by a credit being applied by the Department against a return in May, 1994, is irrelevant for purposes of the statute and cannot affect the date upon which the right to refund otherwise expires. Since none of the exceptions granted by the Act to the 3 year limitation are applicable here, no relief can be afforded to this taxpayer.

It is noted in conclusion that as part of counsel for taxpayer's argument, he tacitly concedes the legal basis for the limitation (Tr. p. 3) but suggests that equity be done. Unfortunately, the limits applied by the statute are absolute and cannot be waived.

Section 6 of the Retailers' Occupation Tax Act, insofar as it provides for the filing of claims for credit or refund of taxes paid, is an express statutorily created mechanism by which taxpayers can retrieve from the state monies paid in under mistake of fact or law. In the absence of such created provision, taxes voluntarily paid, cannot be retrieved.

Because the right of refund is not accorded by common law but is strictly a creature of statute, any time element which is applied to the right is not a "statute of limitation", in the common understanding, but

rather a jurisdictional requisite to the right created. In other words, the limitations period contained in Section 6 is not procedural, but rather substantive in nature. As the court said in *Fredman Bros. Furniture v. Department of Revenue*, 109 Ill. 2d 202 (1985):

...statutes which create a substantive right unknown to the common law and in which time is made an inherent element of the right so created, are not statutes of limitation. (Emphasis supplied)

Thus for the reason stated that this Act and the relief it accords is not merely a procedural limitation but rather substantive right, the effect of its expiration is not an event which may be disregarded by the Department on any grounds, equitable or otherwise. Because the right to file a refund is extinguished rather than simply barred after a certain period, it cannot be resurrected by an affirmative act. The taxpayer is, therefore, without remedy under this section.

On the basis of the above, it is respectfully recommended that the denial of the claim herein submitted be finalized in its entirety.

Administrative Law Judge